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RECORD OF ORAL HEARING

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

EX PARTE JEFFREY A. BEDELL, MICHAEL CODINI, DAVID HUTZ,
DOUGLAS F. MEYER, LUIS V. OROZCO, RAMKUMAR
RAMACHANDRAN, STEPHEN S. TRUNDLE

Appeal 2009-000933
Application 09/884,467
Technology Center 2100

Oral Hearing Held: April 23, 2009

Before LEE E. BARRETT, JOSEPH L. DIXON, and LANCE LEONARD
BARRY, *Administrative Patent Judges*.

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

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1 The above-entitled matter came on for oral hearing on Thursday,
2 April 23, 2009, at The U.S. Patent and Trademark Office, 600 Dulany Street,
3 Alexandria, Virginia, before Christine L. Loeser, Notary Public.

4
5 MR. FARRES: Thank you for allowing us to come here and present
6 our arguments to you today. With me here is John LeBlanc. He's a
7 colleague at the firm.

8 (Off the record.)

9 MR. FARRES: Again, I'm Ozzie Farres on behalf of the Applicant,
10 Micro Strategy, Incorporated. To my right is my colleague, John LeBlanc,
11 from the law firm, who is helping me on these matters.

12 What I would like to do, Your Honors, first is just explain what I
13 would like to do with the opportunity here. I don't want to regurgitate or
14 repeat what's in the Brief. I think it's pretty clear on its face what some of
15 the technical arguments are that we have on the rejections of record.

16 What I prefer to do is speak to what we think is the improper nature of
17 the rejections, in light of the ruling that came out in October 2008, namely
18 the Net Money versus VeriSign case. In particular, what I would like to do is
19 use as the claim for analysis, claim 1, which I think the arguments that we
20 present today would apply to all of the pending independent claims.

21 For purposes of this, to be brief, I want to limit my argument to claim
22 1, but it would apply, what I'm about to say would apply to all the
23 independent claims.

24 JUDGE BARRETT: What was the case? Net Money versus –

25 MR. FARRES: It's Net Money, Inc., versus VeriSign, Inc., and the

1 cite is 545 F3rd 1359. What I would like to do is just give a brief description
2 of our system. We essentially have what's called an online analysis
3 processing system where the user at an end terminal can resolve SQL
4 commands or requests against a data base and thereby slice and dice data
5 and get back reports.

6 With our claims, and the Applicant has several applications –

7 JUDGE BARRETT: Counsel, for the court reporter, you should
8 probably explain SQL, spell it out and tell her what it's an acronym for.

9 MR. FARRES: SQL I have actually committed the acronym to
10 memory. It's a –

11 MR. LEBLANC: Structured queried language, spelled SQL.

12 MR. FARRES: Essentially what it is is you compose various requests
13 and they get resolved against the data base and we get reports, get them
14 more particularized and focused data or information.

15 It's a pretty common practice. What the Application and what these
16 claims focus on is this ability to generate statistics from the actual reporting
17 or the execution of the reporting process itself.

18 That statistic is useful because it highlights trends in the data analysis
19 that is being taken -- being performed by various users. It also showcases
20 the types of data that users are interested in looking at so it is helpful to
21 generate those types of statistics.

22 The Examiner has relied on three documents essentially, all of which
23 purport to relate to one IBM system or platform that is commonly referred to
24 as the OS-390, I believe.

25 What the references talk about is, certainly they talk about this

1 concept of business intelligence which, in the grand scheme of things,
2 doesn't incorporate the type of processing that our client's applications or
3 invention relate to, meaning this concept of resolving SQL commands and
4 other types of requests against data bases and getting information back.

5 Going to claim 1, if I may, what we have, and I will read just
6 verbatim, the computer implemented method for capturing at least one
7 statistic for data regarding performance operation of a business intelligence
8 reporting system that generates business intelligence reports based on
9 requests submitted to perform analysis of data contained in the data base.

10 The method comprising the steps -- and here is the first important
11 step. We claim that the gathering of at least one statistic or data related to
12 the performance operation of the reporting system while the reporting
13 system is operating.

14 The Brief goes into the fact that the references don't really relate to the
15 -- don't read on the language, specific language on the claims, but I'm not
16 going to belabor that point.

17 What I want to do is focus the Board's Attention on what the
18 Examiner relies on to substantiate the rejection as it relates to that particular
19 step, the gathering step.

20 The Examiner refers to this IBM document authored by Hahn and
21 others, a document entitled, Capacity Plans for Business Intelligence
22 Applications. For that gathering step, the Examiner references page 65 of
23 that document, and refers to the system management facility or SMF as it's
24 known.

25 A little bit of background on what the SMF does. The OS-390

1 platform in this document is disclosed and is taught as teaching the ability to
2 monitor system performance or system behavior or system patterns.

3 It has three primary monitors to perform that task, the SMF facility or
4 management facility which the examiner relies, the SMF.

5 Turn the page to 66, it also relies on a resource management facility or
6 RMF, and lastly, it refers to a DB-2 performance monitor.

7 So those three monitors collectively gather data from the performance
8 of the OS-390 system. The Examiner, back to claim 1, says that SMF
9 monitor gathers at least one statistic related to the performance operation of
10 the reporting system.

11 Moving on to step 2, step 2 requires analyzing at least one statistic or
12 data. For that limitation, the Examiner moves away from the SMF monitor
13 and starts to rely now on the resource management facility or RMF.

14 In particular, what the Examiner says is that the statistic or data as
15 disclosed is analyzed quarterly by this RMF. Interestingly, the Examiner
16 doesn't rely on this particular document to support that. He goes to a second
17 document and cites to pages 2-251 to 2-256 and explains that those pages
18 teach different types of exception conditions and what have you.

19 The problem that we have here is that we have got the Examiner on
20 the one hand citing one of the monitors, the SMF, as the one who gathers
21 and collects data. And then for the analyzing of that collected data, he relies
22 on this completely different monitor, the RMF.

23 The VeriSign case or excuse me, the Net Money case clearly states
24 that in order to substantiate an anticipation rejection, the reference must,
25 within the four corners of the document, teach the exact same claimed

1 invention.

2 The Examiner is not allowed to cut and paste or take different pieces
3 from different embodiments and compose a system. I think the meaning, the
4 purpose of that is pretty clear. You want to be able to require that
5 anticipation rejection, anticipating the claimed invention, not a composed
6 form of the claimed invention –

7 JUDGE DIXON: So you are saying that the SMF and the RMF are in
8 completely different systems?

9 MR. FARRES: They are within the same system.

10 JUDGE DIXON: Different embodiments?

11 MR. FARRES: They are different components.

12 JUDGE DIXON: But then how is that different, as you said, in
13 different embodiments is what the case you were talking about. Yes, if there
14 is embodiment 1 that is complete and embodiment 2 that is complete also,
15 you pick and choose from each embodiment, but here it is one system, isn't
16 it, with just different parts of the system.

17 MR. FARRES: The system has to follow what the claim -- the claim
18 defines what the system is and, as defined by the claim, you have got the
19 reception of, let's say, a collection of statistics.

20 Maybe if I could explain this a little bit more to what the SMF does
21 and what the RMF does, I think this might highlight a little bit better.

22 The SMF gathers system information, namely, and it's defined, by the
23 way, in page 65.

24 JUDGE DIXON: Of Hahn.

25 MR. FARRES: Of Hahn, correct. The component collects and

1 records system and job-related information.

2 Admittedly, it's not very clear exactly what that is, but conceding the
3 point that that gathers the relevant type of information that is set forth in our
4 claim, we know that that gathers system and job-related information.

5 The RMF, however, gathers completely different information, going
6 more towards the resource.

7 One of the issues, and I was going to get to this point later but I can
8 allude to it now. It's not very clear what the resource management facility is
9 actually gathering.

10 Page 66 of Hahn, the last paragraph in 5.1.2, refers the user to the
11 RMF user's guide. We don't have that before us today and it was not part of
12 the rejection so it is very difficult to really come to a definitive
13 understanding of what the RMF facility, or the, yeah, the RMF is actually
14 collecting and gathering. But I think the important point is because the claim
15 said that that particular data gathered is the one that is analyzed, there needs
16 to be consistency in the rejection that if you are going to say the SMF is
17 gathering that data, then I think under Net Money, Inc., then the SMF needs
18 to be the one who is analyzing that data or at a minimum, whatever
19 component is analyzing that data is analyzing the specific data gathered by
20 the SMF.

21 We just don't have on the record before us a definitive understanding
22 or a clear understanding that that is exactly what is taking place. In fact, I
23 would argue that we have the contrary because the resource under 5.1.2,
24 page 66 of Hahn, we do have an understanding that there is a relationship
25 between the RMF and the SMF to this extent.

1 You can read in 5.1.2. the RMF is also a component of the OS-390.
2 RMF itself has three separate monitors within it that collect and write data
3 into the SMF records. So we know we have data flow going from the RMF
4 to the SMF. These records are created in the SMF data sets and eventually
5 are off-loaded. Here is the important point. The RMF host processor routine
6 can then process these RMF records to create comprehensive reports. This,
7 by the way, goes now to step 3 of the claim. After you have gathered the
8 data, after you have analyzed it, then step 3 of the claim requires that you
9 generate at least one output based on that collective data.

10 The RMF is creating records based on its own RMF records. There's
11 nothing in the references before us to indicate that the RMF records contain
12 the data that was gathered by the SMF.

13 For that reason, we think that there is inconsistency between the -- or
14 in the rejection to the extent that you have got one component, the SMF,
15 gathering the data and a separate one analyzing and issuing reports on the
16 data.

17 The problem is, it's not the same data. The data being gathered by the
18 SMF is not the same data being analyzed and reported on by the RMF. We
19 don't know, we don't have a clear sense of what that data the RMF is
20 analyzing and reporting is because we don't, based on our review, we don't
21 have all of the RMF information.

22 JUDGE BARRETT: Were these arguments made anywhere are in
23 your briefs?

24 MR. FARRES: They are all premised on the VeriSign case which
25 came out in October '08, so to the extent we didn't have the benefit of that

1 principle before us, we didn't incorporate it into the Briefs.

2 JUDGE BARRETT: So this is all something new that we are going
3 do be considering now? These arguments are all -- they are not on paper
4 anywhere, right?

5 MR. FARRES: No, sir. No, Your Honor. The case is the VeriSign
6 case. The quote that I think puts all this in perspective, I can read it, it
7 actually is cited in a more recent federal circuit case.

8 It says as follows: The law of anticipation requires a specific
9 description as well as enablement of the subject matter at issue. To
10 anticipate, the reference must not only disclose all elements of the claim
11 within the four corners of the document but must also disclose those
12 elements arranged in the claim.

13 Then it cites the Net Money case which is 545 F3rd 1359 and
14 VeriSign quotes Connell versus Sears, 722 F2nd 1542, and also In Re
15 Arkley which is a CCPA case, 455 F2nd 586. The quote that the federal
16 circuit looked at is from Arkley in the 1972 decision, the reference must
17 clearly and unequivocally disclose the claimed invention or direct those
18 skilled in the art to the invention without any need for picking, choosing and
19 combining various disclosures not directly related to each other by the
20 teachings of the cited reference.

21 So we don't have enough in these references to be able to say that
22 what the RMF -- what the SMF is gathering and collecting in terms of data is
23 the data that is being analyzed and reported by on the RMF. There's a
24 bridge, there's a gap there that we can't -- what's before us, a bridge.

25 JUDGE BARRETT: This is not new law, right?

1 MR. FARRES: I think what the Net Money, Inc., case established
2 was the clear notion that you can't just pick and choose various embodiments
3 and compose them into one system for purposes of substantiating a 102
4 rejection. So what the Net Money case does is it shines a brighter light on
5 known principles.

6 JUDGE BARRETT: You are not arguing that we can't look at the rest
7 of this reference.

8 MR. FARRES: No. In fact, one of the issues is that we certainly
9 would like to see what that other reference is. Quite candidly, we don't have
10 it before us and these are very voluminous documents.

11 We are not suggesting that the Examiner is not close to being right.
12 We just don't think from where he is at right now we have enough to really
13 substantiate rejection under 102 of these claims.

14 I would also point out that there are multiple references being used.

15 JUDGE BARRETT: They are all inscribed in the same system
16 though, right?

17 MR. FARRES: That is not what I am saying.

18 JUDGE BARRETT: You are not saying it is a bad anticipation
19 rejection.

20 MR. FARRES: No. That is not what I am saying. There are many
21 documents here. It is a pretty comprehensive system and these are rather
22 technical documents. But based on our review and based more importantly
23 on the excerpts the Examiner is referring us to, we just noted that one
24 inconsistency between.

25 JUDGE DIXON: If you go a little further on page 66, and they talk

1 about the DB2 performance monitor. They are looking at the data base and
2 their performance monitor and how performance data is gathered, generated,
3 where they talk about statistics and then they throw the SMF in there as the
4 destination for it and then how the DB2-PM reports the data.

5 Doesn't that sound, I mean, strictly dealing with the DB2 system, that
6 sounds like your claimed invention and it is hard to argue that, well, the
7 SMF or the RMF is doing it. It's all related to the DB2.

8 MR. FARRES: I think the DB2 is doing exactly what the RMF is
9 doing and that is gathering data and giving it to the SMF.

10 I think if you really boil down the issue in a nutshell, what you have
11 or don't have is disclosure or an argument that what is in the SMF is being
12 used, is being analyzed, first and foremost, as required by the second step of
13 claim 1, and secondly, is being used to generate an output and subsequently
14 an alert based on conditions.

15 That's the problem is we have got, conceding the point, we have got
16 the data collected by the RMF and I haven't looked at it more in detail but
17 assuming that the DB2 does the same thing, those two systems gather data,
18 perhaps even analyze it and perhaps even report on it.

19 But we don't have information on two things, number 1, that the SMF
20 data itself is being analyzed and reported on or, two, we don't really have a
21 clear understanding of what the RMF data being collected is. And secondly,
22 again, I haven't looked at it specifically, but I don't know what specific data
23 is being collected by the DB2.

24 JUDGE BARRETT: One of your arguments was that this Hahn
25 reference is only gathering statistics on the operating system and not on a

1 business intelligence reporting system. But isn't the whole gist of this
2 reference talking about capacity planning by looking at statistics of the
3 reporting system as it is operating and gathering information about disk
4 usage, users who use it, peak workloads of people who use this business
5 intelligence system?

6 MR. FARRES: Right.

7 JUDGE BARRETT: I mean, section 4.2 talks about key
8 characteristics of a workload. It talks about workload profiling, profiling
9 usage of a workload, average peak utilization on page 54, shows some
10 graphs on figure 8 on page 55, which all look like statistics gathered about
11 usage of the system.

12 So something in the system is doing this data gathering, whether the
13 SMF or RMF, so it looks like it's really gathering statistics about the
14 operation of the reporting system and analyzing that data and displacing it
15 on a graph like figure 8.

16 MR. FARRES: Right. I don't think we have much more to add to
17 what's in the brief.

18 I concede, I think I already acknowledged that the references certainly
19 relate to and involve business intelligence, which is essentially the type of
20 processing that we do in our claimed invention.

21 Perhaps the only other thing that I would say is that the focus of these
22 documents of Hahn and the resource RMF report analysis document is you
23 are trying to ascertain capacity for the overall system to work.

24 And the focus there more is, to the extent we are talking about
25 business intelligence applications or the report applications, what these

1 documents are more concerned about is whether or not the program or,
2 excuse me, the platform has the proper capacity to run.

3 JUDGE BARRETT: To run that particular application, correct?

4 MR. FARRES: Correct. For example, if on day 1, you have got ten
5 users, you want to make sure that you have got enough processing capability
6 which is why they get into a lot of things like CPU, workload, timing issues,
7 IO issues.

8 Our application is more concerned on the performance of the actual
9 execution process itself.

10 In other words, what type of data is being commonly used? When are
11 such requests being submitted? It's more statistics that go to the
12 performance of the application itself, the report execution application and
13 not as much the ability of the underlying platform to perform optimally.

14 JUDGE BARRETT: I'm not sure I see that in the claim. For
15 example, figure 9 on page 57 talks about various business intelligence
16 workload profiles, one for this OLAP-type data base. One is for simple
17 report writing, mixed workloads, these are all statistics about a workload, a
18 business intelligence workload during the day.

19 So I'm not sure I see any difference in the kind of data that's gathered
20 here versus the kind of data that is claimed.

21 MR. FARRES: I will concede that the references are certainly close
22 and to the extent we have an argument, we've got it in the Brief and it is
23 certainly, we admit it's a nuanced one.

24 We go back to the extent it's a new rejection and I invite the Board to
25 take a closer look at it. But we think in light of the new development in the

1 law, the clarity provided by the new development in the law, that we have a
2 pretty compelling case, at least as composed currently, the rejection is
3 flawed under the Net Money case.

4 JUDGE BARRETT: Are there any questions?

5 MR. FARRES: Thank you so much for your time, Your Honors.

6

7 (Whereupon, the proceedings were concluded on Thursday, April 23, 2009.)

8